UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Charlottesville Division

JASON KESSLER, et al., Civil No. 3:19cv00044

Plaintiffs,

vs. Lynchburg, Virginia

CITY OF CHARLOTTESVILLE, et al.,

10:07 a.m.

Defendants. January 16, 2020

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES SENIOR DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: JAMES EDWARD KOLENICH
Kolenich Law Office
9435 Waterstone Blvd. Suite 140
Cincinnati, OH 45249

ELMER WOODARD
5661 US Hwy 29
Blairs, VA 24527

For Deft. City Of Charlottesville and Tarron J. Richardson: RICHARD H. MILNOR
Taylor Zunka Milnor & Carter LTD
414 Park St.
Charlottesville, VA 22902

For Deft. Al S. Thomas: MELISSA Y. YORK
DAVID P. CORRIGAN
Harman Claytor Corrigan & Wellman
P.O. Box 70280
Richmond, VA 23255

For Deft. Crannis-Curl: ERIN R. MCNEILL
Office of the Attorney General
202 North Ninth St.
Richmond, VA 23219

Proceedings recorded by mechanical stenography; transcript produced by computer.

APPEARANCES (Cont'd):

For Deft. Jones: ROSALIE PEMBERTON FESSIER
Timberlake Smith
P.O. Box 108
Staunton, VA 24401

Court Reporter: Sonia Ferris, RPR, OCR
U.S. Court Reporter
116 N. Main St. Room 314
Harrisonburg, VA 22802
540.434.3181. Ext. 7

THE COURT: Good morning.

Call the case, please.

THE CLERK: Yes, Your Honor.

This is Civil Action 3:19cv44, Jason Kessler, and others, v. The City of Charlottesville, and others.

THE COURT: Plaintiff ready?

MR. KOLENICH: Ready, Your Honor.

THE COURT: Defendants ready?

MS. YORK: Yes, Your Honor.

THE COURT: All right. We're here on defendants' motions, so whoever would like to start.

MS. YORK: Good morning, Your Honor. Missy York from Harman Claytor on behalf of former chief of police, Al Thomas.

An August 12, 2017, Jason Kessler, David Parrott, and members of the Alt-Right converged on Charlottesville for the Unite the Right rally. Counter-protestors, including members of Antifa groups, also descended upon the city. Mutual combat and violence ensued, resulting in a declaration of an unlawful assembly and dispersal of all in attendance. Kessler and Parrott have now sued former chief of police, Al Thomas; former city manager, Maurice Jones; current city manager, Tarron Richardson; Virginia State Police, Lt. Becky Crannis-Curl; and the city itself, alleging violations of their First Amendment rights of free speech and expression.

Specifically, plaintiffs allege that defendants permitted the heckler's veto by standing down and refusing to protect the Alt-Right so that the rally could proceed as planned. Plaintiffs have not stated a claim against Chief Thomas, for four reasons. First, there are no facts to support the claim of an alleged heckler's veto. Second, Chief Thomas did not have a duty to protect the plaintiffs. Third, there are no facts to support a claim of supervisory liability. And finally, Chief Thomas is entitled to qualified immunity.

Turning first to the heckler's veto. A heckler's veto occurs when an enforcement action is taken against a peaceful speaker based on a listener's reaction to that speech. That is not what occurred on August 12, 2017, and is not what plaintiffs allege in their complaint. There was mutual combat and violence among protestors and counter-protestors leading to the declaration of an unlawful assembly and dispersal of the entire crowd. By its very nature, that was a content and viewpoint-neutral restriction of speech. Furthermore, it was an action wholly within the defendants' rights to take.

The Supreme Court of the United States in Cantwell v. Connecticut stated: "When clear and present danger, a riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order

appears, the power of a state to prevent or punish is obvious."

Here, the Virginia unlawful assembly statute provides that an assembly is unlawful, "whenever three or more persons assembled share the common intent to advance some lawful or unlawful purpose by the commission of an act or acts of unlawful force or violence likely to jeopardize, seriously, public safety" --

THE COURT: Are sufficient facts in the complaint to support that both sides were engaged in --

MS. YORK: -- in violence, Your Honor?

THE COURT: -- disorderly or violent conduct?

MS. YORK: Yes, there are, Your Honor.

While the complaint does attempt to portray the Alt-Right as innocent victims of the Antifa conduct, if you look at the Heaphy report, which is mentioned in the complaint and can be considered at the motion to dismiss stage, it is clear that there was mutual combat and violence among all those in attendance.

THE COURT: The Heaphy report is not a part of the complaint.

MS. YORK: If the Heaphy report is not a part of the complaint, Your Honor, yes, we believe that there are sufficient allegations in the complaint itself to demonstrate that there was mutual violence.

THE COURT: Let me ask you before we go on. Would you contest incorporating the Heaphy report into the complaint as an integral part of the document?

MS. YORK: Do we contest incorporating the Heaphy report? No, Your Honor.

THE COURT: I'll ask all the parties the same question.

MR. KOLENICH: Jim Kolenich for the plaintiff, Your Honor. We do not contest incorporating the Heaphy report as an integral part of the complaint.

MS. MCNEILL: Erin McNeill on behalf of Lt. Crannis-Curl. We do not contest.

MS. FESSIER: Rosalie Fessier on behalf of Maurice Jones. We do not contest.

MR. MILNOR: On behalf of the City and Tarron Richardson, we don't contest the part of the allegations in the complaint -- not the truth, but it is part of the complaint.

MR. CORRIGAN: Your Honor, I'm David Corrigan. I also represent Chief Thomas with Ms. York.

MS. YORK: Your Honor, so we do believe the allegations in the complaint, even absent the Heaphy report, support the fact there was mutual combat and mutual violence such that the unlawful assembly could be declared. The declaration of unlawful assembly has not been challenged. So

it is a fact that was declared. And the United States District Court for the Eastern District of Virginia in United Steel Workers v. Dalton ruled that the unlawful assembly statute does not impermissibly infringe on First Amendment rights. That holding is consistent with the Supreme Court's decision in Cantwell that the police can regulate speech when there's a threat to public safety.

So, Your Honor, August 12, 2017, was not a heckler's veto but a content and viewpoint-neutral police decision to protect the public safety. The facts of this case stand in stark contrast with that of Bible Believers v. Wayne County, Michigan in which the Sixth Circuit Court of Appeals determined that the county violated the Bible Believers First Amendment rights by effectuating a heckler's veto. In that case, there was an evangelical group that attended an Arab festival to try to convert non-believers and call sinners to repent. They walked through the festival wearing T-shirts bearing their message and carrying signs and even carried a severed pig's head on a stick. They preached to the festival attendees, and onlookers began to throw bottles and debris. Each time a police officer would approach the crowd, the actions would cease. But then, eventually, the Bible Believers were removed from the festival in lieu of being arrested for disorderly conduct, and the police informed them that they were "attracting a crowd and affecting public

safety." The district court granted the defendant's motion for summary judgment, and a panel of the Sixth Circuit affirmed, but en banc, the Sixth Circuit reversed because there were less restrictive means available to maintain public order in lieu of removing the Bible Believers from the festival.

But unlike the situation in Bible Believers where you had a peaceful demonstration that was then bombarded by assaults of onlookers, plaintiffs were not part of a peaceful protestor group that was dispersed because of the actions of onlookers and listeners. Faced with the unlawful assembly involving both protestors and counter-protestors, law enforcement dispersed the entire crowd, and that was a content and viewpoint mutual restriction of speech, did not constitute a heckler's veto and, therefore, did not violate the plaintiff's First Amendment claim.

Moreover, in support of their First Amendment claim, plaintiffs rely heavily on the allegation that law enforcement did not take sufficient action to quell the counter-protestors, instead purposefully doing nothing so that they could declare unlawful assembly. But plaintiffs still have a constitutional right to protection. It is well-established under the Supreme Court, the Fourth Circuit and even this Court's precedent that there's no constitutional right to police protection from unlawful acts

by private citizens. In fact, this Court in Turner v. Thomas held that there was no clearly established right to police protection when a counter-protestor was injured during the August 12, 2017, Unite the Right rally. Similar to plaintiffs in this case, Mr. Turner argued that there was a stand-down order and police took no action to protect him from violent protestors. This Court concluded, and the Fourth Circuit affirmed, that Chief Thomas was entitled to qualified immunity because there was no constitutional duty to protect. Nevertheless, plaintiffs here argue that law enforcement had an affirmative duty to protect their right to free speech.

In Deshaney v. Winnebago County Department of Social Services, the Supreme Court concluded the Fourteenth Amendment language of "no state shall deprive any person of life, liberty or property without due process of law" was a limitation on the state's power to act, not a guarantee of certain minimal levels of safety and security. The court determined that the Fourteenth Amendment did not confer an affirmative right to governmental aid, even where necessary to secure life, liberty or property.

Similar to the language of the Fourteenth Amendment, the First Amendment provides, in relevant part, that "Congress shall make no law abridging the freedom of speech or the press or the right of the people to peacefully

assemble." This, likewise, limits government's power to act and does not confer an affirmative right to governmental aid.

If there's no constitutional right to protection of one's life from violence under the Fourteenth Amendment, there's certainly no constitutional right to protection of free speech under the First Amendment. For these reasons, the plaintiffs have not stated a claim for violation of the First Amendment.

Nor have they stated a claim against Chief Thomas for supervisory liability. Plaintiffs seem to hold Chief Thomas liable because he was supervising city police officers and allegedly caused them to fail in their duty not to acquiesce to the heckler's veto. Shaw v. Stroud established a three-part test for establishing supervisory liability under Section 1983. The supervisor must have actual or constructive knowledge that his subordinate engaged in conduct that posed a "pervasive and unreasonable risk of constitutional injury." The supervisor's response to that knowledge must be so inadequate as to show deliberate indifference or tacit authorization, and there must be an affirmative causal link between the supervisor's inaction and the particular constitutional injury.

Here, plaintiffs' claim for supervisory liability fails for the same reason that the First Amendment claim fails; namely, that they did not have a constitutional right

to be protected and there was no constitutional injury.

Moreover, even if plaintiffs have stated a claim, Chief Thomas is entitled to qualified immunity. This Court previously determined in Turner v. Thomas that Chief Thomas was entitled to qualified immunity for the acts of August 12, 2017, a decision that was affirmed by the Fourth Circuit and for which cert was denied by the Supreme Court of the United States. The Court should reach the same decision in this case.

As Your Honor is aware, there are two prongs to qualified immunity: First; that the facts allege a violation of a constitutional right; and second, that the right was clearly established at the time of the violation. As argued on brief and here today, the facts in the complaint do not allege a violation of plaintiffs' constitutional rights. Furthermore, such a right was not clearly established on August 12, 2017.

To determine if a right is clearly established, the law must be particularized to the facts of the case. A Court must ask whether it would have been clear to a reasonable officer that the alleged conduct was unlawful in the situation he confronted. This Court has already determined that it was not clearly established that ordering officers not to intervene in private violence between protestors was an affirmative act within the state created danger doctrine.

That decision was affirmed on appeal. If anything, it was clearly established at the time of the Unite the Right rally that failing to intervene in private violence does not violate any constitutional rights. For example, in Johnson v. City of Seattle, the Ninth Circuit concluded that a passive operational plan in which law enforcement did not engage with violent actors did not amount to a constitutional violation.

Similarly, it was not clearly established here that Chief Thomas would violate plaintiffs' First Amendment rights by declaring an unlawful assembly in the wake of violence and fighting amongst protestors and counter-protestors and dispersing the entire crowd. Because plaintiffs have not --

THE COURT: How much violence did it take before he was entitled to shut it down?

MS. YORK: Your Honor, the law enforcement must make the decision that the unlawful assembly statute was violated. So there has to be acts of unlawful force or violence likely to jeopardize, seriously, public safety, and that decision was made and it has not been challenged, and it's admitted in the complaint that an unlawful assembly was declared and the entirety of the crowd was dispersed.

THE COURT: The chief had determined that violence would occur.

MS. YORK: It was occurring and that's why the

unlawful assembly was declared.

THE COURT: When the people got together, was he required to take any less restrictive type of action that might have prevented this --

MS. YORK: There's no preemptive action --

THE COURT: -- that would have prevented him from having to declare an unlawful assembly?

MS. YORK: No, Your Honor. Because there is no duty to protect under the First Amendment, just like there's no duty to protect under the Fourteenth Amendment, there was no action that was required to be taken, short of declaring the unlawful assembly, because all of the crowd was dispersed. It was necessarily a content and viewpoint neutral restriction on speech. Everyone was dispersed, not just the Alt-Right, and not just the counter-protestors.

THE COURT: Well, if he knew there was going to be disorderly conduct there or enough violence to declare the unlawful assembly -- he waits to do that. He knows he's going to shut down. His plan is to shut the whole thing down and will deny the plaintiffs their -- they have the permit to make their speech. Is he helping the hecklers?

MS. YORK: No, Your Honor. Because there's no affirmative duty of the state to take the action the plaintiffs neglect to have taken to protect their right to speech, just like there was no -- this Court has determined

there was no duty to protect under the Fourteenth Amendment in that situation, to intervene and take action, law enforcement did not have a duty to intervene and take action in order to permit the speech to continue. They have a duty not to suppress speech, but once the violence ensued, the unlawful assembly statute was triggered and everyone was dispersed. So there was no heckler's veto. It's not like Bible Believers where you had a passive group that was --

THE COURT: I know he shut down both. There's no question about that. But since he was anticipating declaring an unlawful assembly -- he pretty much knew it was going to come to that point -- was he required to take any action that would have been less of a deterrent to the First Amendment rights of a party?

MS. YORK: Your Honor, it's our position that he did not have to take less restrictive action. There's no case law to suggest that there's an affirmative duty to protect the rights of free speech. There's no affirmative duty to protect one's life under the Fourteenth Amendment. So there was no duty there, Your Honor.

I would accede to my co-counsel.

THE COURT: All right.

MS. MCNEILL: Erin McNeill, Your Honor, representing Lt. Crannis-Curl of the Virginia State Police.

Lt. Crannis-Curl is in a very similar position with

respect to the law as Chief Thomas so I won't go over the points that Ms. York just made for this Court. I would like to say, however, in response to the Court's last question, that the police did take intermediate steps before the governor declared the unlawful assembly. They were visibly present everywhere throughout the planned area where this rally would occur, and through routes to Emancipation Park. They had barriers set up for the speakers and police manning those barriers in an attempt to divide the hostile crowd from the inflammatory speakers, and those two intermediate steps were specifically cited by the Sixth Circuit in Bible Believers as being appropriate intermediate steps that law enforcement should take before they attempt to interrupt the speech or restrict the speech, and both of those actions were taken.

In Bible Believers, the Sixth Circuit expressly said that because the police, when they were present, did quell the hostile reaction of the crowd, restricting the speech wasn't an appropriate step because simply a greater police presence would have interrupted, slowed or stopped the violence. And in this case, the police did have an extremely visible presence throughout that area in an attempt to dissuade the crowd from reacting with unlawful violence, and that is an appropriate intermediate step. Barriers were another intermediate step that was cited by the Sixth Circuit

as being appropriate before interrupting the speech, and those were present and manned at the time.

Finally, in Bible Believers, the Sixth Circuit expressly said that the police don't have to go down with the speaker, although they can't turn a complete blind eye, even in the Sixth Circuit, to the possibility of hostility like those police did at the Arab festival. They simply walked away and let the peaceful speakers be victimized by the inflamed crowd. Here, the police were standing by, but they don't have to put their own health and safety in jeopardy to intervene in stopping a violent reaction to a speaker. That's even in that Bible Believers case from the Sixth Circuit, which goes beyond anything we have here in the Fourth.

I would also say that this actually isn't a heckler's veto case. Mr. Kessler made a heckler's veto case when he challenged the revocation of the permit for the rally. He argued that to restrict his permit, because there was violence anticipated -- that's a heckler's veto, and that fact pattern fits a heckler's veto argument a little better. But, here, we're talking about what actually happened at the rally, and the complaint does not seem to dispute that once the rally becomes a riot, the state certainly can disrupt a riot or disperse all people equally, and that's not a heckler's veto. It appears Kessler is trying to make an

argument that he had a greater right to police protection to prevent the inflamed reaction of the crowd or, specifically, Antifa. But that puts us more squarely under the fact pattern of Turner v Thomas than Bible Believers.

In Turner v. Thomas, as this Court knows -- it was decided in this court. That's where you have protestors who want to speak. They're put in jeopardy by counter-protestors. As Ms. York already very ably argued, that was a case where Mr. Thomas was relying on his right to life and personal security and that the state had a duty to protect that constitutional right to life. But this Court found, correctly, and was affirmed on that point, and cert was denied by the Supreme Court, that there is no right to police protection, not even to protect your life or personal safety. Here, Mr. Kessler attempts to recast that same argument, but instead of a right to life, it's a liberty interest in his right to free speech. But there's no greater right to police protection to protect your free speech than there is to protect your life, certainly, and these facts don't even approach the case law that we have. In that line of cases that were predecessors to Turner v. Thomas where you have really egregious facts where the police absolutely knew something happened -- they had a person in custody and released the person to commit violence -- the Antifa was never in police custody, and in fact, the complaint goes

through pages and pages of allegations of how Antifa follows the Alt-Right around the country and has disrupted multiple rallies and speeches around the country, clearly showing that the Antifa reaction was not set in motion by any of the defendants. And, furthermore, the complaint itself actually takes the step of discussing what happened at another Alt-Right rally before Mr. Kessler's where the police provided a more active protection so that those KKK members could get in and out of their parking deck without being harmed, and the complaint even admits that those police officers were assaulted by the crowd, that they weren't effective in completely preventing the violence, and that that informed the reaction in Mr. Kessler's -- at Mr. Kessler's rally. That's in the complaint itself, without incorporating any documents, that the police had that prior reaction from Antifa and weren't able to stop them from attacking the KKK at an earlier rally. Therefore, you have right in the complaint that the Antifa reaction was not something set in motion by the state, nor was it something that could have effectively been prevented by the state. And the case law is very clear even in the Sixth Circuit where they've articulated this heckler's veto in greater detail than we have here in the Fourth that the police don't have to put themselves in jeopardy to save a speaker, and the complaint is unusually detailed in admitting those facts.

Your Honor, I just did want to add before I conclude that the complaint itself does reference mutual combat, although obliquely. Although it does say with respect to Lt. Crannis-Curl that she was concerned about sending her officers out into the jeopardy, that they were observing mutual combat. At least from the perspective of the defendants, they believed that both sides were engaged in mutual combat, and that's in the complaint itself, without incorporating the report that the perception was that there was mutual combat and that the combatants were from both sides, as alleged in the complaint.

Other than that, I would stand on what Ms. York articulated for Chief Thomas. The case law applies very similarly to Lt. Crannis-Curl because there's no right to police protection to prevent Antifa's violent reaction beyond the preventative measures they took that proved ineffective. There could be no supervisory liability for officers who didn't violate Mr. Kessler's rights, and certainly no state actor is liable for the wrongful acts of third parties.

The qualified immunity analysis from Turner v. Thomas is exactly the same as it is in this case. None of the state actors in this case had notice that they had this duty to protect Mr. Kessler's right to free speech without a violent reaction from Antifa. It would be an impossible duty and, fortunately, here in the Fourth, the law is quite clear that

it doesn't exist, and that has been affirmed by the Fourth, and cert was denied by the Supreme Court. I think that's as clear a statement on the law as we can get.

So for that reason, I respectfully conclude. Thank you, Your Honor.

THE COURT: Thank you.

MS. FESSIER: Good morning. I'm Rosalie Fessier here on behalf of Maurice Jones.

Maurice Jones was the former city manager, and he stands in very similar position as Chief Thomas. The allegations against Mr. Jones are even more remote and removed than they are against Chief Thomas. The allegation against Mr. Jones is not that he took any overt act, but rather that he stood by as the city manager while Chief Thomas declared the unlawful assembly and dispersed the entire crowd based upon the mutual combat and violence that broke out in August of 2017. So for that reason, we do adopt the arguments put forth by Ms. York on behalf of Chief Thomas. I would just highlight a few additional points briefly, Your Honor.

In paragraphs 50, 51 and 52 of the complaint, that is where the allegations are contained addressing the mutual combat and mutual violence that broke out that was perceived by Chief Thomas and by Mr. Jones, which led to the unlawful assembly declaration. The Court asked that question

previously. I know that all counsel have agreed for the Court to consider as part of this motion to dismiss the Heaphy report, but there are allegations -- specific allegations in the complaint that do set forth the existence of the mutual combat.

Because of that mutual combat, as argued before, it renders the actions content-neutral and, therefore, the strict scrutiny analysis that plaintiff argues just simply does not apply. As has been pointed out, Mr. Thomas has been given qualified immunity in the Turner case under the Fourteenth Amendment and, likewise, should be given qualified immunity here under the First Amendment. There's no law on the books that we have been able to locate which identifies a duty to protect, as has been argued. If Chief Thomas gets qualified immunity here, then so does Mr. Jones, who is only alleged to have stood by and not fired Chief Thomas as he enacted the unlawful assembly. For those reasons, we ask the Court to grant our motion to dismiss.

Thank you.

THE COURT: Thank you.

MR. MILNOR: Your Honor, Richard Milnor on behalf of the City of Charlottesville and its current city manager, Tarron Richardson, who was sued in his official capacity only.

First, as to Tarron Richardson, our motion to dismiss

was based on the law set forth in our brief that, essentially, the official capacity claim against him is duplicative of the attempted Monell claim against the city. If there is a Monell claim, the case law indicates and states that Tarron Richardson should be dismissed. Plaintiff, in their response, agrees with that so we would ask that he be dismissed.

For the reasons previously set forth by counsel for the individual capacity defendants, we submit that since there is no claim stated of a heckler's veto, no claim stated of a First Amendment constitutional violation by them, therefore, since there is no undergirding constitutional violation by either Thomas or Jones as a final policymaker, based on the allegations in the complaint, the city is entitled to dismissal of the Monell claim, similarly to what was done in Turner v. Thomas, which, as indicated -- stated before -- was affirmed by the Fourth Circuit, and then petition for certiorari was denied on January 13th by the U.S. Supreme Court.

Briefly, as to the mutual combat allegations, I did have a note. As Ms. Fessier noted in paragraphs 50, 51 and 52, it refers to the mutual combat and that the chief allegedly witnessed that and made his decision. We submit and agree that there is no -- the First Amendment doesn't protect violence, and once there is violence, there's no

First Amendment right. Nor has plaintiff cited a case showing that he's entitled to police protection in advance -- unilaterally, to police protection. Furthermore, a heckler's veto, they state at -- in their brief -- that their claim -- First Amendment claim basically lives or dies under the viability of a heckler's veto claim. Well, as set forth by other counsel, in reality, in those heckler's veto cases, it's always the policy or the action has been applied unilaterally against one side. Here, there's no dispute that it was equally applied. There's also no dispute based on the claim that the police were confronted with two factions, and there weren't just two or three people. There were many, many people. What they did was reasonable intermediate steps. As said, there's simply no constitutional right to unilateral state police protection, one side or the other. He equally administered it, and we submit there's no undergirding constitutional violation so the claim against the city should be dismissed.

THE COURT: With regard to the Monell claim, would the facts be sufficient -- the alleged facts be sufficient to show that the city manager ratified the policies enunciated by the chief of police when he allegedly said, We're not going to intervene; we'll just let them fight it out and then I'll declare unlawful assembly?

MR. MILNOR: Based on the allegations in the

complaint, I believe it alleges the former city manager was present and heard that, and in earlier cases, we've argued under the city charter the city manager is the final policymaker, and we would argue that he's not -- well, first of all, by being sued in their individual capacity, there's no respondeat superior --

THE COURT: I'm talking about the Monell claim.

MR. MILNOR: On Monell and on the idea one or both are final policymakers, the allegations are what they are -- that Jones basically witnessed it and didn't fire him, I think is the allegation.

THE COURT: Well, he could have overruled him; right? He could have stepped in and said, No, I'm not going -- that's not going to be the reaction, because a city manager can direct the police, I believe.

MR. MILNOR: So under the charter, the charter does indicate that the final authority rests with him. So based on the allegations that he's there and witnesses it and hears it, as they've alleged, while we wouldn't agree as to that, for purposes of the 12(b)(6), it does appear to be alleged. But as a -- you've also got the idea that at the time this is supposed to have happened when he witnessed what he witnessed, the violence was, at that point, clearly ongoing. Mutual combat violence. So at that point, there is no First Amendment protection to start with.

THE COURT: The then city manager, when the chief of police made the statement, We're not going to intervene until they start fighting and then I can declare an unlawful assembly -- the city manager is allegedly present.

MR. MILNOR: During the time when the chief makes that statement, the violence has already occurred.

THE COURT: All right.

What are the specific allegations in there that -- is that in the Heaphy report?

MR. MILNOR: I don't think it's in their brief, and they've said that they want, I guess, the Heaphy report --

THE COURT: I thought the allegation was the chief said, We're going to let them start fighting.

I didn't understand it, I guess.

MR. MILNOR: Well, in paragraph 51 of the complaint, it's alleged that -- well, paragraph 50, it says that the instruction was not -- it didn't say for the police to do nothing. It said not to go in and break up every fight, not to interrupt mutual combat. It wasn't an instruction not to do anything. It was mutual combat, i.e., violence by both sides. Then it says in paragraph 51, which is what the chief allegedly witnessed, that during the event, upon being advised that the violence had broken out, the chief made his statement, Let them fight, which Maurice Jones allegedly, according to the complaint, was in the center and heard, and

they say he didn't fire the chief on the spot with that.

THE COURT: All right. Go ahead, then.

MR. MILNOR: So we submit that by that time, there is no -- clearly, there's no First Amendment right because the First Amendment doesn't protect violence. The chief has advised it.

Now, I think the Court earlier on asked how much violence does he have to witness? Well -- but they had -- I mean, he was obviously between a rock and a hard place with mutual violence breaking out between both sides. So the action that he chose to do was not a heckler's veto. It was not unilaterally applied against just one side. It was applied against both sides and it was permissible under the Virginia statute, and it's really not challenged by the plaintiff -- the validity of the unlawful assembly declaration. But what they appear to be claiming is that before the rally even began that the police had a duty to protect them, the Alt-Right, as opposed to any duty to the so-called counter-protestors. They've cited no case showing that they're entitled to a private municipal security force, especially in this situation.

What happened is they did have police presence. It wasn't -- I remember back in the Turner v. Thomas case, the Court asked the question: Well, what if the police hadn't even shown up? I mean, then how could there be a Fourteenth

Amendment violation? Well, the police did do something. They did. They did a lot. And they showed up. They monitored the situation. There were barriers. They attempted, and after the event, Monday morning, we have, you know, revisited and looked at what happened and say how could we do it better and what could we have done? But they did. They -- and they're not required to go down with the speaker.

We submit it was not unilaterally applied. It was applied equally, and it's simply not a heckler's veto.

THE COURT: Okay.

But your position is that the stand-down order was given after the violence started, not before, that the allegations are that the stand-down order was given before any violence started.

MR. MILNOR: They do allege that they planned to do that, but it was in anticipation of this violence. What happened, they say, is, in paragraphs 50 and 51 and 52, that upon that occurring, what happened was they declared an equally applicable unlawful assembly, which for a brief period of time curtailed First Amendment rights because there's violence, ongoing violence. And we submit that that is not a heckler's veto and that there's no undergirding constitutional violation against Chief Thomas or Chief Jones, and so, therefore, there can't be a Monell claim against the city.

THE COURT: Okay. All right.

Before you get started, is it the plaintiffs' position that the heckler's veto was effectuated by the acquiescence of the police when the stand-down order was given or when they acted or when they declared an unlawful assembly?

MR. KOLENICH: It's actually both, Your Honor.

The plan to stand down and permit counter-protestor suppression of the plaintiff's speech constitutes a heckler's veto. However, there was a second incident, which is the declaration of the unlawful assembly and kicking everybody out. It's the plaintiff's position -- and we're satisfied. The presentations of counsel and the questions the Court has asked, I don't intend to say very much up here anyway. We're happy with the state of the record and with our pleadings.

When they kicked everybody out, they perpetrated a heckler's veto. They were required, contrary to everything that the defendants have presented here today -- the heckler's veto law is well established in the Fourth Circuit, even though everybody seems to be talking about Bible Believers because that's the current leading case. That is a Sixth Circuit case. But the Fourth Circuit has sufficiently similar rules dating back to 1985 at least. When they went from police doing nothing to terminating the entire event, that's a heckler's veto. There were no intermediate steps

taken. The police never advanced and shut down the hecklers, or tried to. The police had barriers, but those barriers excluded the speakers. After they declared the unlawful assembly and Mr. Kessler presented himself and said, I'm the permit holder and I should be allowed to get in here and speak, even if everybody else is getting kicked out, they said, No, you're gone, too. No speakers were ever allowed behind those barriers. So this entire presentation is more or less the opposite of what happened that day except for the mutual combat. Yes, everybody knows that Unite the Right -- there was mutual combat. No, we are not challenging the unlawful assembly statute. Of course the government has the right to impose public order in the face of such a riot. What we're alleging is the preexisting stand-down order violated the heckler's veto of the First Amendment rights of the plaintiff. And, secondarily, after they made the unlawful assembly decision, they should not have removed everybody. They should have left a couple of speakers, a couple of supporters, a couple of counter-protestors, and a couple of their supporters. These were easily identified. Kessler presented himself to the police and they had clergy members there, who were no doubt known in the police community to be not violent at all. If they want to come in and say Kessler was violent too, I guess that would be different, but that's not part of the record at this point.

THE COURT: Weren't there various groups on both sides? I mean, I guess we're talking about the statues. There were more than one group there in favor of removal of the statues, and more than one group in favor of not removing the statues.

MR. KOLENICH: Yes, Your Honor.

THE COURT: How could the police be fair?

MR. KOLENICH: They couldn't. Once they've declared the unlawful assembly and they're kicking the vast majority of the people out, all we're saying is, at a bald minimum, they should have left Kessler and a couple of other people who the police didn't see do anything wrong. If Kessler says, Can I have these four guys stay with me to hear my speech, and the policeman comes up and says, No, no, no, I saw that guy throw a rock and he has to go -- but they didn't do anything. We don't need to get into trying to second-guess government conduct. They did nothing. They stood there with an existing stand-down order and waited until they were told to clear the place out, and then they cleared the place out. And all of that because of the content of the plaintiff's speech. Now, when the melee starts -- our fault, their fault, nobody's fault -- yes, the police have a compelling interest to terminate that melee and to clear the streets and get everything settled down, although, as we all know, that's not what happened. They

cleared the streets and more violence occurred. But we very much disagree that Dushaney is the proper standard on a heckler's veto, and we disagree they have any case that says that. There are no cases that say that. This is a First Amendment case. It's a heckler's veto case, and I would like to -- I believe I have a citation here that's not in our brief that I would like to mention. This is Rockford Life, 411 Fed. Appx. 541 at 554, and it states that courts have recognized a heckler's veto is an impermissible form of content-based speech regulation for over 60 years. That's at 554. And it cites to Berger v. Battaglia, 779 F.2d 992, which is a Fourth Circuit reported case from 1985.

Yes, it's true there are no Fourth Circuit cases that go into the detail of Bible Believers, but we believe the law is still there. Bible Believers states that the police have a responsibility to enforce -- not Bible Believers -- Berger v. Battaglia at 1001 states that the police are responsible for enforcing First Amendment rights.

THE COURT: What would be your best case that would deny qualified immunity to the various individual defendants?

MR. KOLENICH: I can't answer that with a single case. It's Bible Believers combined with Berger v. Battaglia.

THE COURT: Bible Believers is Sixth Circuit, and that wouldn't count.

MR. KOLENICH: Well, it's persuasive.

In the Fourth Circuit, it's Berger v. Battaglia, combined with other cases, principally Rockford, like I just mentioned.

As defense counsel stated, the Fourth Circuit does not have a case similar to Bible Believers with that level of discussion of heckler's veto. But the Fourth Circuit cases -- there is no dissent from the view that the heckler's veto is well established in this circuit.

THE COURT: Well, it's well established, but under the particular facts close to those in this case --

MR. KOLENICH: The facts close to those in this case are, in fact, a little different from the average heckler's veto case. But in -- it's not true. We very much disagree that if there's a melee, heckler's veto goes out the window and the riot statute takes over. There couldn't be a heckler's veto claim at all if that was true because the counter-protestors would just show up, throw a few rocks, hit on some people and that's it; there's a riot and they shut the thing down, and there could never be a heckler's veto claim then.

THE COURT: I assume the Heaphy report would show that it was anticipated that there would be violent groups on both sides.

MR. KOLENICH: I believe it does, yes, sir.

THE COURT: Do the police have an obligation, the City of Charlottesville have an obligation to furnish security for the event?

MR. KOLENICH: I think that's a debatable point, but we don't have to address it here because they were there. They were there in force. Had they not shown up at all and people were calling 911 -- Hey, there's a riot going on -- when the police show up and start arresting people and start clearing the place out, they still would have had a duty at that point to protect the free speech rights of the plaintiff. They still should have figured out what was going on there. Did somebody have a permit? Is there supposed to be a speech? And impose order and let as much of that speech happen as they possibly can. Now, theoretically, things could be so out of control they can't do that, but they didn't even try here, and that's really the gravamen of our complaint, although we do agree, as counsel just said, that our complaint lives or dies with the heckler's veto. If the Court finds we had no such right, then our case is gone. We agree with that characterization.

Thank you, Your Honor.

THE COURT: Do you wish to respond?

MS. YORK: Your Honor, the issue seems to be with the alleged passive policing plan, and such a plan was not only recognized as constitutional previously in this court, Turner

v. Thomas, but in the Ninth Circuit in the Johnson v. City of Seattle case. The concern with engaging groups of this nature is that you make the problem worse. They have the capacity to make the decision to not engage to a certain extent in order to best police the public safety.

It's ironic that we're here today because in other cases, specifically, Turner v. Thomas, the argument was that the defendants, including Chief Thomas, did not do enough to protect -- to stop the violence. Yet now, the suggestion is that he should have taken some step short of declaring the unlawful assembly and dispersing the crowd when there's no suggestion that something else would have been successful. This is a classic case of Monday-morning quarterbacking. The plaintiffs would have us believe the police should have gone in and discerned who was for whom and who had a right to be there and the law is, once unlawful assembly is declared, everyone can be dispersed.

In Cantwell, the Supreme Court of United States said when clear and present danger of riot, disorder, or immediate threat to public safety exists, the police can intervene, and the unlawful assembly statute says when conduct likely to jeopardize, seriously, public safety, peace or order, unlawful assembly can be declared. The allegations in the complaint establish those conditions existed. Paragraph 73 says Mr. Kessler walked toward Market Street and saw the

skirmishes between Alt-Right trying to enter the park and Antifa trying to impose a heckler's veto. The allegations of the complaint itself, absent going to the Heaphy report, show that there was mutual combat.

The complaint also alleges that violence was anticipated. The plaintiffs cannot point to a single case that suggests the police have a duty to affirmatively protect First Amendment rights preemptively or otherwise. Your Honor, it's our point that under the Fourteenth Amendment, they don't have -- the police don't have a duty to protect one's life from violence so how could they possibly have a duty to protect the plaintiff's speech?

So, Your Honor, we would argue that not only is there not a heckler's veto, there's no First Amendment violation, but it was not clearly established at the time of the August 12, 2017, rally that Chief Thomas would have violated anyone's constitutional rights to free speech by declaring the unlawful assembly and dispersing the entire crowd, so he is entitled to qualified immunity.

MS. MCNEILL: Very briefly, Your Honor. I just wanted to address the argument that Berger v. Battaglia, which is the Fourth Circuit case -- the only Fourth Circuit case the plaintiffs have set forward and the Fourth Circuit case that they cited to you as their best Fourth Circuit case to put the defendants on notice that they had this duty to

protect the plaintiff from a heckler's veto. In Berger v. Battaglia, that was an employment case. A police officer was told he had to stop performing in black face or he would be fired because the police chief or -- were concerned that for an officer to perform in black face would tarnish the reputation of the police force and the community and raise concerns in the community about that police officer's ability to police in a racially neutral manner, and the Court analyzed a heckler's veto in the context of what restrictions on speech can a state employer put in place on a state employee, what conditions can they put in place, and the Fourth Circuit examined and held that to restrict the private speech of a state employee that had no touch or concern with their employment, simply because they were concerned about the community reaction, was unlawful here in the Fourth Circuit. That fact pattern is so far afield from what the defendants faced at the Unite the Right rally that it provides no notice to them that they have a duty to protect the free speech rights of a private citizen who is inflaming the crowd. The complaint itself admits that these parties, both Antifa and the Alt-Right, have a longstanding history of anonymity and violence. So these two walked into -- these two groups walked into the Unite the Right rally prepared for violence, and to say that a case about an officer performing in black face in his off hours and what restrictions an

employer can put -- a state employer can put on a state employee as a condition of employment is so far afield from what we're facing here that it does not defeat the qualified immunity claims of Lt. Crannis-Curl or the other defendants, for that matter.

Thank you, Your Honor.

THE COURT: Okay.

MS. FESSIER: I will note that in argument, plaintiffs' counsel identified the -- or did acknowledge the intermediate steps that police took. That was police presence. That was the barriers; that while they challenge the success of those efforts, that is not the standard by which the Court judges the action there. They did take intermediate steps, the same types of things that were identified in Bible Believers as alternative measures. So that was, in fact, done here. The fact they may not have been successful in retrospect does not change the analysis. There were those intermediate steps and they were acknowledged in the complaint and by the plaintiff.

Also, I will just point out that the stand-down order was only with respect to mutual combat. As is stated, and I think Mr. Milnor pointed out in his argument in paragraph 50, the stand-down order was that they were not to engage over every little thing, not to go in and break up fights, not to interrupt mutual combat. So it was not an order to stand

down when there was a peaceful victim being victimized. So I think that is an important piece of the analysis as well.

Thank you.

THE COURT: Thank you.

Mr. Milnor?

MR. MILNOR: Just a brief word on the Berger case from the Fourth Circuit. This is a 1985 case. It was in the employment context. It wasn't in the context of mass mutual combat by two sides who had a history acknowledged in the complaint of combat at various events.

Also, the cite that they give to being stringently safeguarded, from Berger, they leave out the part that that's premised -- premised on peaceable means. Peaceable. They've admitted that what happened -- what was feared might happen, so you've got a mass of people and a limited number of police, who do show up, and they did do something. They acted. They had no duty under the Fourteenth Amendment to prevent criminal acts by madmen. We submit that if there's no duty under the Fourteenth Amendment, the due process clause, there can be no duty under the First Amendment to provide a private security force for one side or the other. What they did and is acknowledged in the complaint at paragraph 70, where they talk about -- somebody talked to one of the people -- one of the state troopers, and the trooper replied, Our policy today is not to get involved in every

skirmish -- in other words, they were there. And we're here to protect the public safety. That's what they were there trying to do. What happened was, as admitted, the mutual violence came to such an extent that it was necessary to declare an unlawful assembly, which they don't challenge, and they can't challenge. I mean, what happened happened. So as Monday-morning quarterbacking, we look now and say, well, maybe, they could have done this, they could have done this, they could have done this. But what they had to do, what they did do, was they were there to try and protect the public safety, and what they didn't do is unilaterally impose a heckler's veto, which is the heckler's veto cases, on one side or the other. It was equally applied to the violence that was ongoing that played and played out.

So we submit there's no undergirding violation. There's no Monell claim.

Thank you.

THE COURT: All right. I think you all have covered everything well. I'll let you know something reasonably soon.

Good to see you.

(Proceedings concluded at 11:08 a.m.)

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Sonia Ferris January 21, 2021"